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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the matter)	
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Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
Competitive Bidding for Commercial)	
Broadcast and Instruction Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the)	GEN Docket No. 90-264
Commission's Comparative Hearing)	
Process to Expedite the Resolution)	
of Cases)	

Comments of Thomas C. Smith

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These comments are solely my own opinions and views and do not represent any other group. They are based on over 28 years of experience in the broadcast industry as a technician.

OPENING STATEMENT

I would like to express my comments and opinions concerning the proposed rule making concerning the use of competitive bidding for decide the outcome of mutually exclusive applications for broadcast licenses. Congress and the FCC are proposing to replace a system that while flawed and abused, did seem to make sense. That system was that mutually exclusive applicants for licenses where selected on their merits and qualifications according to standards determined by the commission. Applicants did

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know what was required of them before they started the process of applying for a new service. The proposed system would seem to reward those with the most money. I believe that as proposed, the use of competitive bidding will cause more loss of minorities, women, small business and diversity in the ownership of broadcast stations. This is a trend that members of the Commission has expressed concern about.

In examining systems used in the past, both comparative hearings and lotteries and the proposed competitive bidding system, it seems to me that the public, applicants, the FCC, Congress, and the Courts have missed what happens in the granting of a license. The granting of a license for a broadcast station or a subscription communication service is much the same as what, McDonald's, Wendy's, Mail Box Etc., and hundreds of other companies do when they award a franchise. The lack of a businesslike process in granting licenses may be the primary cause of the FCC's problems in dealing with large number of applicants. A new applicant should meet basic technical, financial, character, and management requirements. The Bechtel decision affected the setting of some character and most of the management criteria that the FCC had used in granting applications. This made it impossible to retain a fair application system based on merit.

In my comments, I will discuss my views on past methods of dealing with mutually exclusive applicants, problems with the use of auctions, other models of granting licenses and they relate to the proposed rules and other issues raised in this notice.

Fairness and predictability in the application process should be the prime concern of this rule making. The auction process should be made to meet this standard and if not Congress and the FCC should find a better model of granting licenses.

PAST SYSTEMS FOR MUTUALLY EXCLUSIVE APPLICANTS

The problems concerning mutually exclusive applicants

has increased over the years due to a number of things from how business in this country is viewed to how the FCC has changed it's regulations and the methods of authorizing of new services.

Thirty years ago, there were fewer services that used the spectrum. The primary user's were public service (police and fire), private radio (taxi's, trucking, etc.), broadcasters, and microwave relay (mostly AT&T). Because of the limited number of user's, there was not a lot of competition for licenses. Most of the competition was in the broadcast area and there was usually 2 or 3 applicants, making it easier to separate the differences between the applicants. The growth of FM radio started to increase the pressure on comparative hearings, but the problems seem to become more severe in the late seventies. As more people became interested in UHF-TV and with the FCC starting new services such as cellular phones. low-power TV and the 80-90 FM's, more people became interested in investing in FCC regulated businesses. This was in sync with the increased interest in business investment in the 1980's.

I believe that the comparative hearing system ran into problems at that time for a number of reasons. The first reason was that many people would no longer recognize the decisions on the FCC and it's hearing processes. Losing applicants became more willing to challenge the decisions before the FCC and in the courts and many of the FCC's criteria were ruled unusable. At the same time the FCC started deregulation of it's rules which further reduce it's criteria. Things such as reducing financial information and requirements on applications made it easier to apply. Also, changes in ownership limits, studio location rules and the elimination of the 3 year holding rule raised more interest in applying for new stations. Another problem is that no other business has to start-up in such a public way. FM and TV applicants must signal

their intentions when they ask to amend the table of assignments. Then, when any broadcast application is filed, they must alert the public with a public notice and basically invite competition for the grant of the license. No other business has to do that. In fact most people normally do not know other types of business are starting up until they see the construction, a zoning notice or the business announces it themselves.

Lotteries were started as a method to determine winning applicants for other than broadcast services, but the FCC got overwhelmed with applicants. At this time "Applications mills" were created to take advantage of the new opportunities presented by the new services and rules. These "Application mills" created a lot of speculative applications which increased the application load on the Commission. Because of this, Congress decide that auctions would be used for government spectrum that was being turned over for commercial use.

The cost of processing these applications, whether under comparative hearings or lottery, was much greater than the FCC was collecting in application fees. The FCC did start to use a more realistic fee schedule for many services in the late 1980's. These fees could not have recovered the FCC's cost in drawn out hearings or a lottery's with overwhelming numbers of applicants. The FCC in it's Report to Congress on Spectrum Auctions in part 3, The History of Comparative Hearings, Lotterys and Auctions, stated that the cost of processing applications for the lotteries was extremely expensive for the applicants, the FCC and the public.

With what I have read in the past and in reading the FCC's Report to Congress on Spectrum Auctions, I have to ask the question, how many applicants would there of been if the application fee would have approached the true cost of the processing the application. Would there have been as many applicants, if the fee was several

thousand or several tens of thousand dollars. With the cost been only a few hundred's of dollars, it was like buying a lottery ticket at the local convenience store. With the increased number of new services and the increased number of applicants in a changing business world, a land rush type mentality was created that none of the application processes could handle.

THE PROBLEMS WITH AUCTIONS

From the first time I heard about the proposals to use auctions, I questioned how they could be fair to small business. I also questioned the fairness to the taxpayers and to the new licensees. I still have reservations about the use of auctions to grant licenses. Any policy that requires a Consumer Alert as the one posted on the FCC's auction WEB page has to be somewhat suspect.

Concerns about the fairness of auctions to small businesses seems to be one of the most discussed issue among columnists in communication trade magazines, FCC rule makings and comments by members of the Commission during FCC meetings about those rule makings concerning auctions. Chairman Kennard and other Commissioners have expressed concern about the loss of minority, women, small business ownership of broadcast stations and the diversity of voices as the industry consolidates into large group ownership.

Most of the applicants for new stations have been small business people and individuals. The FOX TV Network would probably not exist if it weren't for many small business people building UHF-TV stations in the late 1970's and early 1980's. Few of those stations were built by existing groups of station owners. The same goes for most of the 80-90 FM stations. Many of these stations were bought by the large groups only after they became successful.

Many of owners financed these stations by mortgages on their homes, their life savings and limited loan

opportunities. The small prospective station owner does not have the financial ability to match the bidding, if someone with deep pockets makes an unreasonably high bid. There is also the question on how the banking community or the Small Business Administration will handle credit to small business with the uncertainty of the cost of a license due to the unknown outcome of bidding for each license.

I have two examples of the financial situations of small stations. The first is the case of a small startup station that I provided technical assistance for in 1982. The owner financed the station with proceeds from the sale of his home and assistance from his family. He was also able to get a lease agreement for the purchase of the station's equipment. He had a total of about \$120,000 of cash and leasing financing. He had very little room for unexpected costs and needed some certainty in those costs. He operated the station for 4 years before selling it. An other example is in Peter Hunn's story of how he built a station in upstate New York on a very small budget. He wrote about his station and on how to plan small stations for others in his book STARTING AND OPERATING YOUR OWN FM RADIO STATION (TAB Books, ISBN 0-8306-2933-5). The amounts in these two cases are probably lower than normal, but, I believe that these two people are closer to the normal startup owner than someone with several hundreds of thousands or a few million dollars of investment capital.

With the changes in ownership limits, it now seems that larger groups may now start to get involved in applying for new stations if they sense they can outbid smaller applicants and they are under the ownership limit in that market. They would be able to increase control of the marketplace by limiting any new competition.

The unfairness of auctions as far as the taxpayer is concerned is the fact that an auction is a one time event for a particular slice of spectrum in a area. I

have been unable to find any rules on payments when licenses are renewed. Will our children have the sense that they are getting their fair return on the public spectrum in twenty or thirty years. In my opinion, a fee system based on a yearly royalty payment is a better method of charging for the use of spectrum.

New licensees may view auctions as unfair due the fact that they are require to pay for their use of the spectrum and past grantees of licenses did not.

The one time nature of the auctions causes other problems including the politicalization of the process. As Congress looks for revenue to balance the budget, they have demanded that the FCC reallocate spectrum for auction. This has caused the dislocation of some users to other less desirable bands or the loss of bandwidth. While the FCC says that the main propose of auctions is to speed up the licensing process, the need to raise revenue as Congress has requested, has to color the process. The FCC can also reallocate a finite amount of spectrum before users are packed so tight, that interference becomes uncontrollable.

Another concern to the taxpayer is the perception that the government is selling the spectrum and not leasing it. While the new licensees and the government know the these licenses are for a fixed term, many of the public does not. There also can be the perception that government is giving favor to or collecting a legalized bribe from those with the most money. With campaign financing a major story, it is easy to come to such conclusions.

The Commission has had problems with auctions and has spent a lot of time making changes to the rules to attempt to correct these problems. The majority of most rule making notices for new services deal with the conduct of the auction and not the technical standards for the new service. Many of the problems came from defaults in auctions that were aimed for or attracted so-called small business such

as the Personal Communications Service C group and the Interactive Digital Video Service. Articles in the WALL STREET Journal and the NEW YORK TIMES in late November of 1997 noted problems with lower than expected bids in the Wireless Communications Service and delays in other auctions, particularly in the LMDS auction for lack of interest and difficulties of applicants in obtaining financing.

Some problems with auctions may be unrealistic expectations because Congress has overpriced the value of spectrum in their budget making. Spectrum is only one component in any communications business's value with location, management, marketing of services and, in the case of broadcasting, programming counting for a large share of value of the service. In some cases the use of spectrum can be replaced, such as when video services are carried on cable. Because the FCC no longer collects revenue information from licenses and only has information on license transfer sale prices which can be either inflated or undervalued, it is difficult to determine the value of the spectrum component value. All the costs of operating these FCC regulated businesses need to be considered when attempting to value these services.

These problems need to be addressed before many of us can have confidence in the auction process.

OTHER MODELS FOR LICENSING

As I became more concerned about the fairness of auctions, I tried to find other methods to grant licenses. Any method has to be fair, discourage speculation, and assure that the applicant is qualified. Lotteries seemed to fail on all counts. Auctions may discourage some types of speculation by the use of minimum bids, but has potential fairness and qualification problems. Comparative hearings can be fair and assure qualified licensees by the use of the right standards, but, it has no method of limiting speculative applicants who may meet minimum standards as

set by the FCC. The courts have made difficult the create anything more than a very basic set of standards.

The only models that seemed to possible was that of the franchise such as McDonalds, Wendys, Pizza Hut, and hundreds of others use or that of cable TV. A business franchise usually awards the right to do business in a certain area and the cable franchise awards the right to use public right-a-way. FCC licenses define a specific area in which to operate and the spectrum could be considered public right-a-way, so both of these franchise models could be appropriate

Because franchising has a long record of success and it bears some resemblance to FCC licensing, it seemed like a model to study. Franchisers seem to be able to process applications without being over run by speculation. Because cable franchises are awarded by local governments they seem to have some of the some problems that the FCC has experienced.

Commercial franchiser's require that applicants meet certain requirements, charge upfront fees and royalties. Because people know what is required and they are enforced, these who are not serious about going into the business are not encouraged to apply. These would seem to satisfy some of the problems in selecting FCC licensees. Upfront fees run from a few hundred dollars to tens of thousands of dollars with most between 10 to 50 thousand dollars. Having to pay an up front fee should reduce many speculative applications, as the fee would be somewhere from the midpoint to top of the average franchise fee. The fee should be similar to other types of business with the same investment costs and revenue potential.

The royalty fee would satisfy the need to return value to the taxpayer for use of the spectrum and would be predictable in estimates for budget revenues.

The problem with the franchise model is that because of court rulings, only a limited number of standards can

be set. The ones that could meet court tests would no doubt be basic technical standards, no criminal records, ability to pay government fees and put the facility on the air. Management requirements that a franchiser would demand probably would not meet court tests.

The franchising model may not meet Congress's directives and fill all of the FCC's needs, but because of businesses long experience with it, franchising may provide answers in handling the licensing process. I believe that before any new licensing system is put in place, other models including this one needs to be examined.

QUESTIONS AND ISSUES IN USE AND OPERATION OF AUCTIONS

This notice discusses a large numbers of issues concerning the use and operation on auctions for broadcast licenses. Some of the suggested procedures that are discussed would be useful in any type of licensing process whether comparative, lottery or auction. The use of upfront payments and shorter filing times would help assure applicants that are more serious and prepared. The use of short form type applications and the continued use of filing for a rule making to amend FM and TV allocation tables before applying for those stations may still cause frivolous applications.

The FCC should make use of upfront payments, but these payments need to be kept at rates that will not prevent any small business person from applying. I would suggest that a reasonable fixed upfront fee be based on type (AM, FM, TV)and class of station with possible adjustment for market size with special consideration for small stations on the edge of large markets. The use of ratings, ad rates and station sale transaction pricing are too variable from market to market. Station sale transactions can and are subject to speculative pricing and sometimes sell for multiples in excess of normal transaction guidelines. The use of revenue performance would be difficult to use dependably due to the fact that the FCC

no longer collects information on station revenue. The use of population could be difficult as coverage can vary greatly from station to station. The use of any of these criteria would require economic studies and surveys before they could be used. A study of upfront fees by franchisers with like startup costs and revenue potential may provide a good benchmark.

The proposed limiting of the time for notification of filing windows, length of filing windows, and periods to file petitions to deny should assist in assuring that applicants are serious and prepared. An applicant who has done research on the possibility of starting a station in some locale would try to be prepared for a filing window. Those who are seeking a license because the opportunity appeared and thought there was a chance to cash in, would probably have a difficult time in making the deadlines. There has to be many applicants who never considered applying till they saw a notice of a filing window or a application notice in a newspaper. Applications filed on chance and that become a serious competitor in a hearing are what overloaded the comparative hearing process.

Another problem that draws frivolous and non-serious applications is the amending of the table of allocations for FM and TV. Because of the time it takes to process a petition to amend the table and open a filing window, many competing applications can be prepared. It is not fair to the petitioner who has spent money to do a frequency search and is exposed to new unnecessary competition for his proposed assignment. I would like to suggest that the Commission abolish the process of petitioning for a rule making to amend the table of assignments for TV and FM and make the request for a FM or TV channel part of the application process. All other services including AM, LPTV, translator services, broadcast auxiliary and other existing services such as microwave services tie the frequency request to the station application. I believe

that this would reduce the number of frivolous and unprepared applicants and ease the burden on the remaining applicants and the Commission

The Commission asks about the use of the short form 175 auction application and what, if any other information, they should request in the short form application. The Commission would like to seek most of the information concerning a proposed station in the long form application after an applicant has won an auction. I believe that the Commission should seek some information in the application to participate in a auction, in order to lessen the possibility of default and reauction. The Commission should request minimal information on transmitter location (to meet separation requirements), basic credit information (bankruptcy problems, etc.) and character (citizenship, criminal convictions, certain civil actions) Much of this information should be easily verifiable by routine phone and computer checks. The FCC's proposal to have most of the detailed information filed after the winner is selected, should make little difference as many permits are modified due to many changing circumstances as construction precedes. Some screening before the auction could eliminate some non-serious applicants.

It is proposed to use electronic means for filing of applications and to conduct the bidding in the auctions. I downloaded form 175 software for the LMDS from the wireless page of the FCC web page. It took 3 floppies to hold it and took several tries to load. I then found that in order to use it, I had to connect to the FCC's computer site. All I wanted to due was get some information on what was contained in the form 175, needless to say I did not get my information. If all electronic filings are as difficult to use, many applicants will be disadvantaged if they are not computer literate. I suggest that traditional paper forms also be allowed to be used for applications and phones and other means used in the

bidding.

The question of special preferences to provide equal distribution of services, mainly for AM stations and underserved areas. Some system should be in place to assure service in rural areas. Also, the Commission should provide credit to a daytime AM station wishing to get nighttime service over an AM station wishing increase it's night time service.

While I would prefer that some other method other than auctions were used, I do prefer some methods of auctions over others. I would like to see the use of sealed bids or if multi-round auctions are used, with fixed amounts of bid increases in each round. Most people are familiar with the use sealed bids as they are commonly used by government to seek contractors for construction projects and to purchase goods and services. If multi-round auctions are used, bids should be allowed to be raised at a fixed dollar amount or at a fixed percentage of the up front payment on each round. The LMDS auction for February 1998 has a proposed multi-round auction method with bidding levels set by a complex formula. A fixed level bidding system should be simple and understandable. The Commission should retain bidding credits and installment payments for small business, minorities and women. If these groups do not get some help, there will be very little diversity left in broadcasting. But, no amount of credits can offset a bid that far exceeds any small business's ability to pay. Those with deep pockets still have an advantage

The time period for filing of the long form may need to be longer than 30 days. If many winners are announced at the same time and have to complete applications at the same time, engineering firms may be overwhelmed and unable to meet the deadlines. Sixty to ninety days may be a better period of time. Finally, any timetables for filing windows and for making payments should be long enough notices to be received and forms and to be sent payments.

PENDING APPLICATIONS

I would like to make one proposal concerning the settling of pending applications. If a hearing examiner has determined that all issues are settled and at a stalemate and no settlement between applicants has been reached in the final 180 settlement period, the FCC should give two options to the applicants. Either go to auction or have the FCC supervise the settlement. If the law would allow it, the FCC could have each of the remaining applicants make a sealed settlement offer. The FCC would award the permit to the applicant with the highest settlement offer and divide it equally between the losers. This way, the losers could recover some of their costs in their attempt to obtain the license. I believe it would be fairer than just going directly to auction and the losers not being able to recover some of their legal and engineering fees.

AUCTIONS FOR ITFS

The FCC should retain comparative hearings for ITFS stations. Auctions for this service would penalize local taxpayers. One local or state educational agency would be competing against another. The money would come from the same place, the local taxpayer. Local government leaders and taxpayer groups will surely complain.

SUMMARY

After reading this notice of proposed rule making and numerous other notices, papers and reading articles in many trade magazines, I am still critical of auctions. But, there are many proposals in this notice that will help make the application and granting of licenses less chaotic. The use of restricted application periods and upfront payments would have helped any method of granting of license such as comparative hearings and lotteries. With the use of some of the other proposals in this notice, I believe that other methods of licensing such as hearings and lotteries should be reconsidered as at least a part

of the process.

As long as Congress continues to look at auctions as a revenue source, there will be cloud over the use of auctions. While many in the broadcast industry will not agree with me, I believe the users of spectrum should pay a royalty based on their revenue and that this should be the primary source of revenue to the government form spectrum usage. The current politics of the issue of use of the spectrum for commercial use demands the users pay something. I just want any fee to be fair and revenue collection to be secondary to the application process . Much of the auction process seems to be a Washington and Wall Street answer to the problems of licensing and not a Main Street answer.

The application process needs to be more businesslike which is why the FCC should consider some methods that are use by franchisers considering the differences between commercial law and government regulatory requirements.

The FCC and Congress needs to work together and be willing to make changes in rules and laws if needed to obtain just return on the public's spectrum and provide fairness in all FCC actions.

Respectively submitted

A handwritten signature in cursive script that reads "Thomas C. Smith". The signature is written in dark ink and is positioned below the typed name.

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